

ST 03-0184-GIL 11/18/2003 CONSTRUCTION CONTRACTORS

Persons who permanently affix tangible personal property to real estate act as construction contractors and incur Use Tax liability on their cost price of tangible personal property they physically incorporate into realty. See 86 Ill. Adm. Code 130.1940. (This is a GIL.)

November 18, 2003

Dear Xxxxx:

This letter is in response to your letter dated June 20, 2003, in which you request information. The Department issues two types of letter rulings. Private Letter Rulings ("PLRs") are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department's regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter ("GIL") is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.1120. You may access our website at [www.ILTAX.com](http://www.ILTAX.com) to review regulations, letter rulings and other types of information relevant to your inquiry.

The nature of your inquiry and the information you have provided require that we respond with a GIL. In your letter you have stated and made inquiry as follows:

I am sending this letter to request a ruling on Illinois sales and use tax treatment of prefabricated buildings (i.e., modular homes).

The situation and questions are outlined below. Your prompt response would be greatly appreciated.

Situation:

- Company A has sales and use tax nexus with Illinois.
- Company A manufactures modular homes outside of Illinois.
- Company A sells a modular home for \$100,000 to Company B in Illinois. Company A's cost of materials for the modular home is \$50,000.
- Company A arranges for a common carrier to deliver the home to Company B in Illinois. Company A bears the risk of loss until the home reaches its destination in Illinois. Company A charges Company B \$5,000 for this transportation. The

charge is separately stated on the invoice along with the charge for the home, for a total of \$105,000.

- Company B then affixes the modular home to real estate in Illinois (acting as a contractor).
- Company B will sell the home to Customer C.

Questions:

1. Is the sale of the modular home by Company A to Company B subject to Illinois sales or use tax?
2. If the answer to Question 1 is yes, what is the amount on which tax applies? Is the transportation charge taxed?
3. If the answer to Question 1 is yes, who is responsible for collecting and remitting the tax?

If you have any questions concerning this situation, please call me.

In Illinois, construction contractors are deemed to be end users of building materials (including modular homes) that they take off the market and permanently affix to real estate. Contractors incur a Use Tax liability on their cost price of the materials permanently affixed to real estate. Illinois retailers making such sales also incur Retailers' Occupation Tax on the gross receipts from the sales of these building materials to the contractor. Thus, contractors having contracts with customers to sell and permanently affix modular homes incur a Use Tax liability on their cost price of materials permanently affixed to real estate. In these situations, the contractors' customers incur no tax liability, and the contractors have no authority to collect tax from them. If the contractors do not remit this tax to Illinois registered suppliers, the contractors must register, self-assess and remit the Use Tax to the Department. 86 Ill. Adm. Code 130.2075 is the Department's regulation concerning the taxation of construction contractors.

In contrast, if Illinois sellers of modular homes do not have contracts with the purchasers to permanently affix the home to real estate, they do not act as construction contractors and do not incur a Use Tax liability. Rather, they act as retailers in retail transactions and incur a Retailers' Occupation Tax liability and must collect the corresponding Use Tax from their purchasers unless an exemption applies (e.g., a sale for resale occurs if the purchaser buys the home for resale to a contractor).

Out of state sellers of modular homes who bring modular homes into Illinois and permanently affix them to real property are viewed as construction contractors. As a result, the sellers owe Illinois Use Tax on the modular homes that they permanently affix to real estate. The Use Tax liability is based upon the cost price of the items which they permanently affix to real estate. If sellers construct the modular homes, their cost price is the amount paid to their suppliers on the purchase of the modular homes. If the out of state sellers have already paid a tax in another state regarding the purchase or use of such property, they will be entitled to a credit against their Illinois Use Tax liability to the extent that they have paid tax which was properly due to another state. See 86 Ill. Adm. Code 150.310.

When out of state sellers of modular homes sell to purchasers or contractors without a contract to permanently affix the modular home to real estate they act as retailers, not construction contractors. When the out of state seller itself delivers the modular home from out of state to its customer in Illinois, the purchaser will owe Illinois Use Tax. The out of state seller would generally collect and remit the Illinois Use Tax on behalf of their customer.

In general, shipping and handling or delivery charges are includable in the gross receipts subject to tax unless the buyer and seller agree upon such charges separately from the selling price of the tangible personal property which is sold. In addition, such charges must be reflective of the costs of shipping and delivery. To the extent that these charges exceed the costs of shipping, they are subject to tax. See 86 Ill. Adm. Code 130.415. As a technical proposition, handling charges represent a retailer's cost of doing business, and are consequently always includable in gross charges subject to tax. See 86 Ill. Adm. Code 130.410. However, when such charges are stated in combination with shipping charges, they will be nontaxable to the extent the above tests are met.

The best evidence that shipping and handling or freight charges have been contracted for separately from the selling price is a separate contract for shipping and handling or freight charges. A separate listing of freight charges on an invoice, by itself, is insufficient. However, documentation that demonstrates that purchasers had the option of taking delivery of the property, at the sellers' location for the agreed purchase price, or having delivery made by the seller for the agreed purchase price, plus an ascertained or ascertainable delivery charge, will suffice.

I hope this information is helpful. If you require additional information, please visit our website at [www.ILTAX.com](http://www.ILTAX.com) or contact the Department's Taxpayer Information Division at (217) 782-3336. If you are not under audit and you wish to obtain a binding PLR regarding your factual situation, please submit a request conforming to the requirements of 2 Ill. Adm. Code 1200.110 (b).

Very truly yours,

Martha P. Mote  
Associate Counsel

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